The Painting Company *and* Tri-State Building & Construction Trades Council, affiliated with National Building & Construction Trades Department, AFL–CIO *and* Painters Local Union #1275, International Brotherhood of Painters & Allied Trades, AFL–CIO–CLC

The Painting Company and Michael Grondon d/b/a Quality Painting Services, a Joint Employer *and* Painters Local Union #1275, International Brotherhood of Painters & Allied Trades, AFL–CIO–CLC. Cases 9–CA–33482, 9–CA–33674, 9–CA–33665–1, 9–CA–33665–2, 9–CA–33723–1, –2

March 23, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On July 14, 1998, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent, The Painting Company, filed exceptions with supporting arguments and the General Counsel filed limited exceptions and a supporting brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order as modified.

1. The General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(1) by threatening to terminate employees if they wore union T-shirts at work. For the following reasons, we find merit to this exception.

Initially, we note that the consolidated complaint specifically alleged that the Respondent violated Section 8(a)(1) by threatening to discharge employees for wearing union T-shirts. This allegation was fully litigated at the hearing. Further, the judge also found that, when unlawfully prohibiting employee David Dunn from wearing a union logo T-shirt at its Ohio State House project, the Respondent's president and co-owner, Jeff Asman, told Dunn that "we're not a union company and either remove that T-shirt or leave the job."[3] We agree with the General Counsel that this statement constitutes an unlawful threat of discharge. See, e.g., *Meijer, Inc*., 318 NLRB 50, 56 (1995); see also *Asociacion Hospital del Maestro,* 283 NLRB 419, 427 (1987), enfd. 842 F.2d 575 (1st Cir. 1988). Accordingly we shall amend the judge's proposed Order to include this additional 8(a)(1) violation.[4]

2. The judge found that the Respondent violated Section 8(a)(3) and (1) by unlawfully terminating employees Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt from its Franklin Furnace job because of their protected union activity. For the reasons set forth below, we agree.

We find that the General Counsel established a compelling prima facie case that employees Crisp, Hull, Meade, and Pratt were terminated precisely because of their efforts to organize the Respondent's Franklin Furnace job. Thus, the evidence establishes that the four employees—who were members of Painters Local 1072—were openly engaged in union organizing efforts and that the Respondent knew of their activities.

As found by the judge, when the Respondent hired the four employees in December 1995[5] for Franklin Furnace, it mistakenly believed that they had been sent by a union representative who sought only their employment rather than recognition or an agreement.[6] However, almost immediately after their December 4 hire, the four began openly discussing the benefits of unionization at work, in the presence of the Respondent's supervisor, Larry Courts. Further, by presenting letters to Courts on December 15, from the Union's Tri-State Building & Construction Trades Council, the four put the Respondent on notice that they were union members who specifically sought to organize the Respondent's Franklin Furnace job. Consistent with this notice, Crisp, Hull, Meade, and Pratt distributed authorization cards and leaflets to employees at the Franklin Furnace site on December 18 and were present during December 26 and 29 jobsite visits by Union Representatives Bud Haslip and Mike Pennington.

Significantly, the organizing activities of Crisp, Hull, Meade, and Pratt (of which the Respondent had clear knowledge), were proximate in time to their January 2, 1996 termination. In addition to the facts recounted above, we additionally note that on December 28, the penultimate workday before their discharge, the Respondent received a copy of the December 15 Tri-State Building & Construction Trades Council (the Union) memo identifying the four employees as organizers. On the same date, the Respondent received a December 27 letter from Local 1072 reiterating their status as organizers and

[1] Respondent Quality Painting Services did not file any exceptions. Inasmuch as all of the violations found, and remedies imposed, run against The Painting Company, all references to "Respondent" are to The Painting Company.

[2] Because the judge has already determined that the Respondent would have terminated its contract with Quality Painting Services when it learned that Quality did not have workers' compensation coverage for painters referred to the Ohio State House project, the sole issue for compliance is when the Respondent would have acquired this knowledge, in the absence of its unlawful termination of the Quality Services contract.

[3] The judge found that Asman said "something along the lines" of this statement to Dunn. The Respondent did not except to this finding.

[4] We have also substituted a new notice.

[5] All dates are in 1995 unless noted.

[6] Although Painters Local Business Representative Bud Haslip originally requested that the Respondent sign a union agreement for the Franklin Furnace job, when the Respondent refused, Haslip modified this request to seek the hire of some union members on the job. The Respondent agreed to this latter request.

protesting that the four were not being paid the applicable journeyman rate.[7]

Coupled with these elements of union activity, Respondent knowledge, and timing, is the fact that the Respondent's proffered justification for terminating the four painters was patently pretextual.[8] In this regard, we note that Supervisor Courts testified that he terminated the four on January 2, 1996, and that his sole reason for doing so was because other Respondent jobsites were shutting down, resulting in the availability for transfer to Franklin Furnace of many painters with "ten, eleven years—five, six [years']" work experience.[9] This explanation cannot withstand scrutiny. First, the record fails to establish that the Respondent had a system of utilizing seniority when deciding which employees to retain.[10] Nor does the record demonstrate that the Respondent had a practice of transferring employees from finished projects to other locations, thereby bumping current employees at those locations.

Next, even assuming arguendo that the Respondent had a system of transferring employees among jobsites using a seniority system, it did not follow this system at Franklin Furnace. Initially, we find that Court's testimony that there were many available painters with 5, 6, 10, or ll years' experience, was—at best—hyperbolic. Indeed, of the 11 painters transferred to Franklin Furnace from other locations between January 2 and 15, 1996, only 3 had been employed by the Respondent for more than 1 year.[11] Further, among the other painters transferred in: one (Lloyd Wolfe) was hired only days before the four; three (Robert Walker, Rena Lawson, and David Metz) were hired after Crisp, Hull, Robert Meade, and Pratt; and two others (Steve Horn and Barnie Traylor) were hired after the four painters and could be construed as "senior" only if their brief periods of previous employment were tabulated.[12] And, to the extent that the Respondent argues that its termination and transfer decisions were not based solely on straight seniority, but also on whether it needed journeymen or apprentice painters at Franklin Furnace, the record does not support that it followed such criteria. Indeed, the Respondent did not raise the journeyman versus apprenticeship argument until its brief to the Board.

Finally, the pretextual nature of the Respondent's termination decision is demonstrated by the fact that, contrary to Courts, Jeff Asman testified that the Respondent had no seniority system, but considered only skill in making its determination. However, were this the case, the Respondent clearly did not follow this system either—as Courts acknowledged that Meade was an excellent painter.

Accordingly, having concluded that the Respondent's asserted reason for terminating Crisp, Hull, Meade, and Pratt was false, we find, in conjunction with the other evidence regarding Franklin Furnace, that the General Counsel established a prima facie case of unlawful termination.[13] We further find that the Respondent failed to

[7] The December 27 letter also stated that Local 1072 previously had raised the wage rate claim to Supervisor Courts on December 26, but that Courts said that he lacked the authority to accept or discuss grievances. Courts was off work from December 27 to 29. On his January 2 return, he promptly terminated the four employees

[8] It is well settled that when determining whether the General Counsel has established a prima facie case of unlawful discharge (or other allegedly discriminatory act), the Board can consider all of the record evidence, including the respondent's explanation for the discharge. *Holo-Krome v. NLRB*, 954 F.2d 108, 113–115 (2d Cir. 1992).

It is equally well established that where an employer's reason for discharging alleged discriminatees is found to be false, the Board may infer "that there is another, unlawful reason for this discharge." See, e.g., *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996), enfd. in relevant part 115 F.3d 36, 48 (1st Cir. 1997), citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). As stated by the court in *Shattuck Denn*:

> If [the administrative law judge] finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference.

[362 F.2d at 470.]

[9] Indeed, the only explanation that Courts gave the four painters on January 2 was that "there's work shutting down elsewhere and we're going to move employees that's been with the Company [longer] than you all down here."

[10] Neither is there evidence that, even if it had a seniority system, that the Respondent tabulated the service dates of rehires from their initial dates of employment.

[11] Transferred employees Moore and Six had worked for the Respondent for more than 2 years at the time of their transfer while employee O'Reilly had worked for the Respondent since 1992.

[12] Of the remaining two transferees, one had worked for the Respondent for about 10 months (Jerry Taylor) and the other (Harrison Stone) had worked for the Respondent less than 2 months more that the four terminated employees.

Interestingly, although the Respondent terminated the four painters, purportedly because of their short tenure, it did not terminate another Franklin Furnace painter (Estelle Mayfield) who had been hired only 1-1/2 months earlier.

[13] To the extent that the judge, in sec. IV,C, par. 3 of his decision, relied on other factors in determining that the Respondent unlawfully terminated Crisp, Hull, Meade, and Pratt, we do not rely on them.

Nor do we agree with the judge's statement in par. 1 of the same section that "the record fails to show that [the Respondent] tends to fire employees who engage in organizing [activities]." We find that the record establishes precisely that fact. Thus, as found by the judge, the Respondent terminated its contract with Quality Painting Services at the Ohio State House project because of the union activities of employees Dunn and Lawson, and terminated Crisp, Hull, Meade, and Pratt because of their organizational activities. Although, as noted by the judge, the Respondent could have seized on an earlier event at Franklin Furnace to terminate the four men (their failure to work weekend overtime at another location), the fact that it stayed its hand on this occasion is not determinative. Indeed, at the time of this incident, the Respondent knew only—by virtue of the Trades Council memo—that the four were its organizers. However, once the four thereafter engaged in actual organizational activities at work, by soliciting cards, and the Union visited the jobsite and filed a "grievance" on the four painters' behalf, the Respondent promptly latched on a patently pretextual reason to terminate them.

rebut that case. In addition to its unsupported "seniority" explanation, discussed above, the Respondent contended at the hearing that Crisp, Hull, Meade, and Pratt were let go because they were substandard employees not suited to Franklin Furnace work. In addition to the patent inapplicability of such a defense as to painter Meade—an admittedly exemplary employee, we find that this constitutes a shifting reason for the termination. As stated in *A. J. Ross Logistics*, 283 NLRB 410, 414 (1987), "In cases of this kind it has been said that 'an unfavorable inference can be drawn from an employer's shifting explanations for its treatment of an employee[,]'" quoting *State County Employees (AFSCME) Louisiana Council No. 17,* 250 NLRB 880, 886 fn. 38 (1980). Further, even as to Crisp, Hull, and Pratt, we agree with the judge that the Respondent failed to meet its burden of establishing that it would have terminated them even absent their protected union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, The Painting Company, Plain City, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs.

"(b) Threatening employees with adverse action if they wore union T-shirts."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to close our doors if you choose to be represented by a union.

WE WILL NOT threaten to discharge you for wearing union T-shirts.

WE WILL NOT discriminatorily order you to cease displaying union symbols.

WE WILL NOT terminate your employment because of your union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the Board's Order, offer Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make David Dunn, Rena Lawson, Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, with interest, less any net interim earnings.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful termination of our employment of David Dunn, Rena Lawson, Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

THE PAINTING COMPANY

Eric A. Taylor, Esq., for the General Counsel**.**
Daniel J. Brake, Esq. (Dinsmore & Shohl), of Columbus, Ohio, for the Respondent, The Painting Company.
Jeffery D. Sammons, Esq., of Columbus, Ohio, for Respondent Michael Grondon d/b/a/ Quality Painting Services.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The General Counsel contends that The Painting Company (TPC) and Michael Grondon d/b/a Quality Painting Services (Quality), as joint employers, violated the National Labor Relations Act (the Act) by threatening employees, and by discharging them, because of their union activity. The General Counsel further contends that TPC (without Quality) violated the Act by terminating its employment of various employees because of the employees' union activities; threatening employees because of their union activities; failing to employ employee applicants because of their connection with a union; and threatening employees with a shutdown of the Company if the employees gained union representation.[1]

As I will discuss in the pages ahead, my conclusion is that TPC violated the Act in many, but not all, of the ways alleged by the General Counsel.

I. TPC

TPC is a painting contractor headquartered in Plain City, Ohio.[2] It is wholly owned by three brothers: Jeff, David, and

[1] The complaint was amended during the course of the hearing. See G.C. Exh. 2 and Tr. 2270.

[2] TPC admits that it is an employer engaged in commerce within the meaning of Sec. 2(2) and (6) and that the Charging Parties are labor organizations within the meaning of Sec. 2(5) of the Act.

Terry Asman.[3] TPC generally employs about 30 painters although it is not extraordinary for its work force to decline to only half that number or increase to about 50 painters.

TPC's work force is not unionized. That is, TPC is not a party to any collective-bargaining agreement and few of TPC's employees are members of any union. That is the case even though much of TPC's business is with state and local governments on projects on which TPC is required to pay its employees at prevailing wage levels and on which most of the other contractors are unionized. In view of this circumstance it is not surprising that officials of the Painters Union (the Union) fervently want TPC's employees to be represented by the Union.[4]

Just as fervently, the Asmans want to keep TPC nonunion. As will be discussed in more detail below, in fact, TPC's president, Jeff Asman, on one occasion proclaimed that he would shut TPC's doors were its employees ever to choose to be represented by a union. I find it more likely than not that, in keeping with the Asmans' intention to keep TPC nonunion, the Asmans do pay attention to the number of employees in TPC's work force who, at any given time, appear to be prounion and to whether an applicant for employment with TPC is, or is not, a union member.

On the other hand:

1. As will be discussed in the pages ahead, TPC does not refrain from hiring painters merely because of their membership in a union. In fact, TPC sometimes actively seeks to hire painters whom TPC's management knows to be union members.
2. From time to time TPC advises local unions that it is seeking painters and invites the unions to provide TPC with painters (all the while, however, refusing to enter into any collective-bargaining agreements).
3. TPC routinely subcontracts out some of its work to companies that TPC's management knows to be unionized, even though that results in union members (employees of the subcontractor) working side by side with TPC employees, and even though there are nonunion subcontractors that TPC could use instead.
4. Even apart from such subcontract situations, TPC's management knows that the Company's employees routinely work in the midst of union members due to TPC's business of working on prevailing wage projects.
5. For all these reasons, TPC's is well aware that unionized employees of contractors working on the same projects as TPC frequently discuss what they perceive to be the advantages of unionization with TPC's employees. TPC's management makes no attempt to prevent such discussions.

That is to say, the Asmans embody, on the one hand, an intense desire to keep TPC union free, and, on the other hand, a willingness in many circumstances to employ qualified job applicants whatever their union status, and an understanding that TPC's employees are routinely and inevitably the subject of union organizing attempts. This decision discusses how this not altogether commonplace mindset played itself out in seven different settings.

The decision does not proceed chronologically. Rather, I discuss in parts II and III circumstances in which TPC plainly violated the Act. Part IV deals with a much more ambiguous situation. But I conclude that there too TPC violated the Act.

Parts V, VI, VII, and VIII cover TPC's firing of an employee after 1 day's employment and the Company's failure to respond favorably to certain employee job applications. The General Counsel contends that, by those actions, TPC violated the Act. I conclude otherwise.

II. MANAGEMENT'S THREAT TO CLOSE THE COMPANY IF ITS EMPLOYEES CHOSE TO BE REPRESENTED BY A UNION

On February 10, 1996, TPC's management called a meeting to explain to employees the Company's implementation of a 401(k) plan. At the meeting: the three Asmans (David, Jeff, and Terry); some consultants expert in retirement plan matters; and about 20 employees.

In the midst of the discussion, a prounion employee, Ronald Freeman, had the following exchange with Jeff Asman (TPC's president). Freeman covertly recorded the conversation, and all parties agree that what follows are the precise words that were spoken:

> FREEMAN: What if the Company goes union? Then will our monies go into the funds of the union?
>
> ASMAN: We won't be going along with this at all. And the Company is not going union.
>
> FREEMAN: Oh, OK. I'm just curious.
>
> ASMAN: There won't be a company—let's put it that way. Because I will do something different. And there will be painting.

An employee hearing this exchange could reasonably come to only one conclusion: were TPC's employees to choose to be represented by a union, management would close the Company's doors.

TPC thereby violated Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 618, 620 (1969).

III. ISSUES PERTAINING TO TPC'S STATE HOUSE PROJECT

Sometime in or before 1994 the State of Ohio engaged a general contractor—the Shook Building Group—to handle the very considerable task of refurbishing Ohio's State House (in Columbus). Shook subcontracted most of the painting work to TPC. (Shook's work force, I might note, and that of most of its subcontractors, was unionized.)

Through no fault of TPC, as of January 1996 TPC's work was far behind schedule. (There had been many delays in plastering and other work that had to be completed before any painting could be begun.) TPC's employees began putting in considerable overtime, along with the employees of all the other contractors on the State House project. But that still was insufficient to get the painting work done fast enough. At that point the Asmans decided to subcontract out, for a temporary period, a relatively small portion of TPC's State House work. The Asmans accordingly contacted several painting contractors that TPC had previously used as subcontractors, but none was available.

While the Asmans were engaged in the process of searching for a painting subcontractor, they heard about Quality (the sole proprietorship of Michael Grondon). On Wednesday, January 17 (1996), David Asman telephoned Grondon. During the

[3] Jeff is TPC's president; Terry is a vice president and a foreman; and David is a vice president and TPC's secretary, as well as TPC's estimator.

[4] By "Painters Union" I intend to refer to the International and to Local Painters Unions having jurisdiction over or near TPC's worksites.

course of the conversation Asman asked Grondon if Quality could provide four painters. Grondon answered affirmatively. Asman then asked about the years of experience of the four painters whom Grondon had in mind. Asman did not ask whether any of the four were union members.

Asman went on to propose a time-and-materials subcontract on the usual terms for such situations, including payment to Quality of an amount equal to (1) the prevailing wage multiplied by the hours worked by Quality's employees, plus (2) an additional amount—a "mark-up"—equal to an unspecified percentage of (1). Asman said that he expected that the subcontract would run for a couple weeks. Grondon accepted the offer.

Also during the course of the conversation between Asman and Grondon, Asman said that he wanted Quality's employees to wear painters' whites (white shirt, white overalls) while on the job at the State House, along with work boots and hardhats. Grondon agreed.

I have been referring to Quality's "employees." The reader should keep in mind, however, that there is an issue about whether the painters that Quality sent to work at the State House were in fact "employees" of Quality. In this connection, during their telephone conversation neither Asman nor Grondon referred to Quality's "employees." Instead they spoke (ambiguously) of Quality's "men." In section C, infra, I discuss the relationship between the four painters whom Quality supplied, on the one hand, and TPC and Quality, on the other, and the reasons why I have concluded that Quality and TPC were joint employers as to those employees.

A. TPC's Response to the Union Activity of Quality's Employees

The time period under discussion here is from Wednesday, January 17 (when Asman and Grondon had their first conversation, as discussed above), to Monday, January 22, when TPC's relationship with Quality came to an end.

January 18. Four of Quality's employees showed up at the State House by start-of-worktime (7:30 a.m.). The four: David Dunn, Rena Lawson, Leroy Allen Hunt, and Scott Allen Hunt. Neither of the Hunts were union members. But both Dunn and Lawson were members of Painters Local 1275 (the Painters Local union in the Columbus, Ohio area). Grondon had told the four that they would have to wear white shirts and pants while on the job at the State House. And all four were dressed that way.

Throughout the 10-hour workday on January 18, the four Quality employees worked uneventfully next to TPC employees doing routine painters' work.

Tony Canter is Local 1275's business manager. Joseph Crytser is an organizer for Local 1275. Canter and Crytser visited the State House project on January 18 and came across Dunn and Lawson. Canter and Crytser knew that Dunn and Lawson were members of Local 1275. They also knew that TPC was nonunion, assumed that Dunn and Lawson were working for TPC, and asked Dunn and Lawson to visit the Union's office that evening.

Local 1275 had been attempting to organize TPC's employees. Canter and Crytser decided to utilize the presence of Dunn and Lawson at the State House to further the Union's campaign. (There is nothing in the record that shows that the Asmans were aware of that campaign. But as touched on earlier, I have no doubt that the Asmans assumed that at virtually all times one Painters local union or another was engaged in efforts to unionize the Company.)

Dunn and Lawson did go to the Union's office on the evening of January 18 and they did meet with Canter. The two told Canter that they were subcontractors of Quality and that Quality had "loaned" them to TPC. Canter responded that he considered them to be employees of TPC, whatever they had been told, and that the Union was trying to organize TPC's employees. Dunn and Lawson agreed to help. At that point Canter gave Dunn and Lawson each a "COMET" T-shirt. ("COMET" stands for "**C**onstruction **O**rganizing **M**embership **E**ducation and **T**raining." In Columbus, at the time, everyone in the construction trades knew that COMET was a union logo.) Dunn and Lawson agreed to wear the COMET T-shirts at work the next day despite Grondon's order that they wear white shirts and pants while working at the State House.

January 19. Dunn and Lawson arrived at work wearing their COMET T-shirts.

About midmorning Jeff Asman happened by and noticed Lawson's T-shirt. Asman ordered Lawson to remove it immediately. Lawson asked why. Asman said something like, "because we're a nonunion contractor." Lawson said, "[N]o problem" and took off the shirt.

A few minutes later Asman noticed that Dunn also was wearing a COMET T-shirt. Asman told Dunn that he had to remove theT-shirt. Asman left the area but returned a few minutes later. Dunn was still wearing the shirt. Asman reacted by telling Dunn something along the lines of, "we're not a union company and either remove that T-shirt or leave the job." Asman again left the area.

Once Asman was out of sight, Dunn left his work area, told Lawson that he was going to call the Union, located a telephone, called Local 1275's office, and told Canter about Asman's order to remove the T-shirt. Lawson accompanied Dunn to the telephone. Canter told Dunn to continue to wear the COMET T-shirt and that he was going to leave immediately for the State House.

Dunn did not then return to work. Rather, still wearing the COMET shirt, he embarked on a series of conversations with various TPC employees about Asman's response to the shirt. When Asman again arrived on the scene, Dunn told Asman about his call to Local 1275's office. Asman said something noncommittal about that news and then ordered Dunn either to get back to work or to leave the worksite (without again referring to the T-shirt). Dunn went back to work.

Before discussing the events that occurred after Local 1275's officials arrived at the State House in response to Dunn's call, I am going to briefly discuss TPC's dress code or, rather, its lack of a dress code.

To begin with, there was a very limited dress code throughout the State House project, one imposed by the general contractor: all employees working in the State House had to wear hardhats and safety boots. But there was no general rule about T-shirts. In fact, on January 19 a number of employees of contractors other than TPC were, without incident, wearing COMET T-shirts in the State House.

As for TPC specifically, TPC had no dress code, apart from an insistence that TPC employees not wear clothing displaying obscene language or images. The Asmans did have a preference about the clothing TPC's employees wore on the job: namely, that employees wear painters' whites. But TPC's employees routinely ignored that preference, particularly in the shirts that

they wore. Colored shirts, generally bearing logos of various kinds, were commonplace. Occasionally a TPC supervisor would complain to an employee about a colored shirt (especially if the logo on the shirt referred to a painting contractor other than TPC). But no employee was ever disciplined for wearing such a shirt, was ever ordered to remove the shirt immediately, or was ever told that he had to leave the job if he insisted on wearing it. Thus, Jeff Asman's response to Dunn's and Lawson's COMET shirts was significantly more dramatic than the responses of TPC's supervisors had ever been to colored T-shirts.[5]

There is an unusual dress code consideration in respect to Dunn, Lawson, and the Hunts (the four employees whom Quality sent to TPC). That is, as touched on earlier, the agreement between TPC and Quality specifically provided that those employees would wear painters' whites. I will consider the import of that contract provision later in this decision.

There is one last point to consider relating to Asman's orders to Lawson and Dunn and to dress code matters generally: Given that TPC was under tremendous time pressure to move ahead rapidly on its work at the State House, it is startling that Jeff Asman demanded that Dunn leave the job if he was unwilling to remove the COMET shirt.

Returning now to the events at the State House on January 19, Canter and Crytser went to the State House in response to Dunn's call. Crytser prepared himself for the visit by concealing a small tape recorder in his pocket.

Canter and Crytser encountered Jeff Asman before meeting with any employee. Crytser switched on the concealed tape recorder.

While the conversation covered various subjects, its focus was on Dunn and Lawson and their COMET T-shirts. In the midst of the conversation, Asman referred to TPC's dress code. Canter said that he did not believe that TPC had a dress code. Asman responded: "[O]ur dress code would be, if we're not union, we can't wear union clothing."[6] Canter and Crytser subsequently found both Dunn and Lawson. They encouraged Dunn to continue to wear the COMET shirt and asked Lawson to put his back on.

At about 3 p.m. on January 19, which was a couple hours after Jeff Asman's confrontation with Canter and Crytser, Asman told each of the four Quality employees (Dunn, Lawson, and the two Hunts) that TPC no longer needed Quality as a subcontractor and that, accordingly, each should stop working and leave the State House site. TPC's work at the State House, Asman told them, was now on schedule. (TPC subsequently credited Quality for 18 hours of work for each of the four employees—10 hours on January 18 and 8 hours on January 19.) Asman had heard some complaints about sloppiness on the part of the Hunts and Lawson. Additionally, Asman was miffed about the fact that Dunn had interrupted his work to complain to various TPC employees about Asman's response to the COMET T-shirts. But as I add up the facts of record: (1) TPC was not in fact on schedule as of January 19; and (2) TPC would not have ended the four Quality employees' work at the State House had Dunn and Lawson refrained from wearing the COMET shirts.

Either just before Asman spoke to Dunn, Lawson, and the Hunts, or just afterward, Jeff Asman telephoned Grondon. TPC had decided to end its contract with Quality, Asman said, because the four men "weren't working out." Asman explained that statement by referring to sloppiness on Lawson's part, to Dunn's and Lawson's wearing of COMET shirts instead of the painters' whites called for by TPC's agreement with Quality, and by Dunn's interrupting his own work and his disrupting the work of other TPC employees to discuss union-related issues. Asman also said something about Dunn's and Lawson's activities resulting in a confrontation with officials of Local 1275. Asman and Grondon concluded the conversation by agreeing to meet on Monday (January 22) to wrap things up.

With TPC's business gone, Quality ended its employment of Dunn, Lawson, and the Hunts.

January 22. Jeff and David Asman met with Grondon in TPC's office on or about January 22.[7] The Asmans' purpose in holding the meeting was to handle the paperwork that would conclude TPC's relationship with Quality.

One item in this connection was the execution of a written contract. (Recall that until this point TPC and Grondon had proceeded pursuant to an oral understanding.) The Asmans presented a standard form of contract to Grondon. As requested by the Asmans, Grondon signed it.[8]

Two of the terms of that written contract differ significantly from reality.

The first is that the contract specifies that work was to commence on January 18 and to "substantially" conclude on January 22. Work in fact concluded on January 19. More importantly, when the oral agreement was entered into, the parties expected Quality's work under it to continue for several weeks.

Additionally, the written contract provides that Quality's responsibility was "paint of light court steel as directed." In fact, at any given moment on January 18 and 19, Quality's employees were assigned by TPC to work in several different areas of the State House, not just the light court.

A second matter handled at the meeting was TPC's payment to Quality. TPC paid a total of $1,784.72. As I understand that figure, it represents payment to Quality of an amount equal to: (a) four employees each working 18 hours at the prevailing wage of $22.01 an hour; plus (b) an additional $200. (The $1,784.72 figure is specified in the written contract.)

Third, the Asmans demanded that Grondon sign a certificate stating that Quality's employees were being paid at the prevailing wage. (Ohio law required that TPC obtain such a certificate from Grondon.) Grondon signed the certificate even though he had no intention of paying any of the four employees anything like $22.01 an hour.

[5] The Asmans were more concerned that their employees wear painters' white trousers, as opposed to blue jeans, than they were about colored T-shirts. Occasionally (but not on the State House job) a supervisor would order an employee who was wearing blue jeans to leave the job. I note that both Dunn and Lawson were wearing painters' trousers.

[6] I make this finding based on transcripts made from Crytser's tape recording of the conversation. (The tape recording plainly was in fact a recording of the conversation between Canter and Crytser, on the one hand, and Jeff Asman, on the other. And all parties agree that the transcripts were, with minor exception, accurate renditions of what was on the tape.) I admitted the transcripts and tape into evidence over TPC's objections. While surreptitious recordings by unions are not calculated to inspire trust and cooperation on the part of the target employers, when they are made in circumstances like the one at hand, the Board deems them admissible evidence. E.g., *Wellstream Corp.*, 313 NLRB 699, 711 (1994); cf. *Waltz Masonry*, 323 NLRB 1258 (1997); and *Monroe Mfg.*, 323 NLRB 24 (1997).

[7] It is possible that the meeting was held on Saturday, January 20, or Sunday, January 21, rather than January 22.

[8] The contract is in the record as GC Exh. 1(u), app. A.

As a last matter, the Asmans asked Grondon to produce the insurance certificates that Ohio law requires that a contractor on a State project (at whatever tier) obtain from its subcontractors. It was then that the Asmans learned that Quality did not carry workers' compensation insurance (on the ground, said Grondon, that Quality had no employees, just independent contractors). That failure on Quality's part was a significant problem, so much so that even had the Asmans otherwise wanted to continue using Quality as a subcontractor, they would have had to terminate the relationship. On the other hand, this January 22 meeting was the direct result of TPC's response to Dunn's and Lawson's COMET T-shirts. While TPC would eventually have discovered Quality's failure to maintain workers' compensation insurance and thereupon terminated its contract with Quality, the record fails to show that TPC would have become aware of the problem as soon as it did absent the T-shirt incidents. (I will return to this matter in the remedy section of this decision.)

B. Conclusion—The Asmans' Response to Dunn's and Lawson's Union Activities

The Asmans' response to Dunn's and Lawson's wearing COMET T-shirts violated the Act in two respects: by ordering Dunn and Lawson to remove the shirts, TPC violated Section 8(a)(1); and by terminating the contract with Quality because of that union activity of the two employees, TPC violated Section 8(a)(3) and (1).

The order to remove the T-shirts. As touched on earlier, and as discussed in part C, below, TPC and Quality were joint employers of Dunn, Lawson, and the Hunts. And, plainly, as an employer of Dunn and Lawson, TPC could not lawfully prohibit its employees from wearing T-shirts bearing a union logo while permitting its employees to wear colored T-shirts bearing various commercial logos. E.g., *Adam Wholesalers*, 322 NLRB 313 (1996); *Meyer Waste Systems*, 322 NLRB 244 (1996).

Moreover even assuming, for the moment, that Dunn and Lawson were Quality's employees only, not TPC's, Asman's orders to Dunn and Lawson to remove COMET T-shirts nonetheless violated Section 8(a)(1). See *Gayfers Department Store,* 324 NLRB 1246 (1997); *International Shipping Assn.*, 297 NLRB 1059 (1990).

There is the fact of Quality's agreement with TPC that its employees would wear only painters' white while on the job at the State House. Perhaps this would be significant if the contractual provision was intended to further some operational purpose such as, say, ensuring that Quality's employees could be readily distinguished from TPC's. But that whites-only contractual term could not have had a purpose different from the Asmans' preference that TPC's employees wear painters' whites. And, as we have seen, TPC's supervisors routinely permitted their employees to wear colored shirts emblazoned with logos of various kinds.

TPC's termination of its contract with Quality. If Dunn and Lawson were employees of Quality but not of TPC, TPC's termination of its contract with Quality would have violated no provision of the Act even though TPC's decision to end the relationship stemmed from Dunn's and Lawson's wearing of COMET T-shirts. *Plumbers Local 447 (Malbaff Landscape Construction*), 172 NLRB 128 (1968); accord: *Computer Associates International*, 324 NLRB 285, 286 (1997).

But since TPC and Quality were joint employers, since TPC ended its relationship with Quality because Dunn and Lawson wore COMET T-shirts, since TPC would not have ended that relationship when it did if Dunn and Lawson had not worn the offending T-shirts, and since TPC's termination of its contract with Quality had the effect of ending Quality's employment of Dunn and Lawson, that termination violated Section 8(a)(3) and (1) of the Act. See *Whitewood Maintenance Co.*, 292 NLRB 1159, 1166 (1989), enfd. sub nom. *Texas World Service v. NLRB*, 928 F.2d 1426 (5th Cir.1991).[9]

C. The Nature of Dunn's and Lawson's Relationships with TPC and Quality

The four employees' relationship with Quality. Grondon called Dunn, Lawson, and the Hunts after speaking with Jeff Asman about the State House job. Grondon said that he had worked for them and that there was going to be a meeting at Grondon's house about it. At that meeting. Grondon told the four: (1) where they were going to work (the State House); (2) to whom they were going to report and from whom they were to take orders (TPC's supervisors); (3) when they had to arrive at work; (4) what to wear (white pants, white shirts, no logos); (5) what "tools" each had to bring with him (one paint brush); and (6) what Grondon was going to pay them ($10 an hour to Lawson, $9 an hour to Dunn, and $7 an hour to each of the Hunts).

At the State House, TPC supervisors did tell each of the four precisely which part of the State House he was to work, which surface—wall or ceiling—he was to paint, and with which TPC employee he was to work. TPC provided each of the four with all needed tools and equipment.

Each of the four worked 10 hours on January 18 and 8 hours on January 19, as instructed by TPC supervisors, and Grondon paid each for those 18 hours of work at the rates that Grondon had previously specified. Quality's profit from the 2-day work for TPC was more than $1000.[10] None of the four shared in any way in that profit.

Under these circumstances, Dunn, Lawson, and the Hunts were, obviously, employees of Quality (and, as will be discussed below, of TPC), not independent contractors. See, e.g., *Chemical Workers Local 1 v. Pittsburgh Glass*, 404 U.S. 157, 167 (1971); *J & S Drywall*, 303 NLRB 24, 36, 38 (1991), enf. denied on other grounds 974 F.2d 1000 (8th Cir. 1992).[11]

---

[9] Given that the General Counsel showed that Dunn's and Lawson's union activities were a reason that TPC ended its relationship with Quality, it was up to TPC to show that this termination would have occurred even absent such union activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *Transportation Management Corp.*, 462 U.S. 393 (1983); accord: *Aneco, Inc.*, 325 NLRB 400 (1998); *Whitewood Maintenance Co.*, 292 NLRB 1159, 1165 (1989). TPC failed to meet this burden. In fact the record affirmatively shows that TPC would not have ended that relationship as soon as it did had Dunn and Lawson refrained from engaging in union activities

[10] Grondon paid a total of $594 to the four ($126 to each of the Hunts, $162 to Dunn, and $180 to Lawson), which $594 was Grondon's entire outlay. Grondon received $1,784.72 from TPC.

[11] Grondon told each of the four employees that each would have to sign a "medical and wage" waiver. In the handwritten waivers (apparently written by Grondon) each purported to agree that he was a subcontractor of Quality. The documents (see G.C. Exhs. 3 and 4) plainly are nullities.

The four employees' relationship with TPC. The question is whether TPC was a joint employer with Quality, of Dunn, Lawson, and the Hunts.[12] The answer is not entirely obvious.[13]

It was Grondon, after all, not TPC, who selected and then hired Dunn, Lawson, and the Hunts and who set their rates of pay. It was Grondon who told the four to report to TPC at the State House. (Jeff Asman had asked Grondon about the years of experience of the four painters whom Grondon expected to send to the State House. But the record suggests that TPC would not have objected had Grondon sent to the State House employees other than the ones to whom he referred in his telephone conversation with Asman.) TPC carried no insurance covering the four and assumed (reasonably) that Quality did. When the Asmans decided that they did not want Dunn and Lawson to continue working at the State House, the Asmans handled it by telling Grondon that they were terminating TPC's contract with Quality, not by telling Grondon to replace Dunn and Lawson with other employees.

As for the establishment of worktime, that was largely a decision of Shook, the general contractor. (Subcontractors of Shook, such as TPC, were not permitted to have their employees begin work before the time set by Shook or to end work later than the time set by Shook.) And it appears that just about everyone in the State House took their morning and afternoon breaks, and their lunch time, at the same times.

As for TPC's imposition of a dress code—painters' whites—on Dunn, Lawson, and the Hunts while they were working at the State House, that too seems beside the point for purposes of determining whether TPC was a joint employer. The requirement of painters' whites is simply too common in the commercial painting business to attribute any significance to it.

On the other hand, TPC's relationship with Quality employees Dunn, Lawson, and the Hunts was very different from that of the typical contractor/subcontractor situation.

In that typical contractor/subcontractor situation, the subcontractor undertakes to perform a particular task. Indeed the written contract between TPC and Quality refers to just such a task: "paint of light court steel as directed." But that contract term—drafted after TPC had ended its relationship with Quality—does not describe the actual circumstances. Rather, TPC treated the arrangement with Quality as one in which Quality provided employees for TPC's use. Thus: (1) Lawson and one of the Hunts were assigned to paint an elevator shaft while Dunn worked in a basement hallway; and (2) each of the Quality employees was paired with a TPC employee—Lawson with TPC employee Ron Freeman; Dunn with TPC employee Barnie Traylor. I note, in that latter regard, Terry Asman's testimony regarding TPC's practice when a new employee is hired: "Obviously if it's a new employee he's going to be paired up with somebody who's already working there."

A subcontractor ordinarily provides at least some of the equipment and materials needed to do the job. Here, Quality supplied nothing. Rather, Dunn, Lawson, and the Hunts arrived at the State House armed with nothing but one paint brush each (which was, moreover, the employees' property). TPC supplied them with everything they needed: paint, paint rollers, push-carts, drop cloths, and the like.

Additionally, a contractor ordinarily subcontracts out work of a kind that the contractor does not ordinarily perform or, at least, does not plan to perform at the worksite in question. (For instance, the record has frequent references to TPC's subcontracts with companies specializing in drywall work or in the preparation of surfaces for the finishes that TPC's employees then apply or in the application of fabric wall coverings.) Here, Dunn, Lawson, and the Hunts performed precisely the same work as TPC's regular work force at the State House: general interior painting.

Further, in the typical contractor/subcontractor situation in the building trades, either the personnel whom the subcontractor sends to the site are sufficiently expert as to make independent decisions about how to proceed with their work or the subcontractor maintains a supervisor or a lead employee at the site who directs the work of the subcontractor's employees. That was not the case here. Rather, even though the four employees whom Quality sent to the State House were incapable of making any but the most rudimentary kinds of decisions about paint application, Quality provided neither supervisor nor lead employee. (Jeff Asman knew that this would be the case; Grondon had told Asman that, because Grondon had injured himself, he would be unable to spend any time at the State House. Thus in Asman's conversation with Grondon on January 17, they agreed that the four Quality employees would work under TPC's direction.) The result was that the work of Dunn, Lawson, and the Hunts at the State House was directed by TPC supervisors and by TPC employees. For example, TPC supervisors and employees told the four exactly where to paint and what paint to use.[14] And on one or two occasions, TPC supervisors determined that the work done by one of the four had been done improperly and ordered him to redo it.[15]

Lastly, when Jeff Asman became miffed at Dunn and Lawson because of the COMET T-shirts they were wearing, Asman did not handle his concern by asking Grondon to remedy the situation; rather, Asman spoke directly to the two, ordering each to remove the offending T-shirt.

It is these circumstances that has led me to the conclusion that on January 18 and 19, 1996, TPC was a joint employer, with Quality, of Dunn, Lawson, and the Hunts.

IV. ISSUES PERTAINING TO TPC'S FRANKLIN FURNACE PROJECT

In late 1995, TPC began work as a painting subcontractor at the then-under-construction Ohio River Valley Youth Detention Center in Franklin Furnace, Ohio, a project of the State of Ohio.[16] The General Counsel alleges that in January 1966 TPC supervisors at the Franklin Furnace site threatened several employees because of the employees' union activities, thereby violating Section 8(a)(1) of the Act, and then, because of those

[12] For a discussion of the criteria by which joint-employer status is evaluated, see, e.g., *NLRB v. Browning-Ferris Industries,* 691 F.2d 1117 (3d Cir. 1982).

[13] Compare, e.g., *Dimucci Construction Co. v. NLRB,* 24 F.3d 949 (7th Cir. 1994), with *G. Wes Limited Co.,* 309 NLRB 225 (1992).

[14] I note that isolated, occasional, and routine direction is not enough to lead to a finding of joint-employer status (*International Shipping Assn.*, 297 NLRB 1059, 1067 (1990)), and that, given the nature of the work, TPC's direction of the four Quality employees was relatively limited. The point is, however, that whatever supervision and direction was needed was provided by TPC.

[15] TPC employee Traylor credibly testified that, in his long experience as a painter, a contractor that is dissatisfied with the work of an employee of a subcontractor ordinarily raises the matter with a member of the subcontractor's management, not with the employee, other than to say something like, in Traylor's words: "[S]top where you're at until I see your supervisor."

[16] Franklin Furnace is in the southern-most part of the State, about halfway between Portsmouth, Ohio, and Huntington, West Virginia.

activities, terminated the employment of these employees, thus violating Section 8(a)(3) and (1).[17]

The four terminated employees: Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt. (The General Counsel contends that TPC fired another employee at the Franklin Furnace site: Carl Frazer. I discuss Frazer's career with TPC in part V below.)

A. The Events of November and December 1995

Crisp, Hull, Meade, and Pratt had been working as painters for a company called BCI Construction at a worksite a few miles from Franklin Furnace: the Greenup County Locks and Dam project. BCI's employees were unionized, and all four employees were members of the Painters Union. By mid-November, when work at the locks and dam project began slowing, the four employees learned that TPC would need painters at its Franklin Furnace project. They spoke to TPC's on-site foreman, Larry Courts, about employment there. Courts needed some additional journeyman painters and hired them, setting Monday, December 4, as their starting date. (There is no dispute that Courts was a TPC "supervisor," within the meaning of Section 2(11) of the Act.)

As will become clear later in this decision, one issue is whether Courts knew, when he hired the four, that they were members of the Painters' Union. The General Counsel contends that Courts was not then aware that the four employees were union members. The Company contends that Courts and one of the Asmans did know that they were.

A problem that TPC faces in this connection is a written statement by TPC's counsel. During the course of the General Counsel's investigation of the unfair labor practice charges in this case, counsel for TPC wrote to the General Counsel stating: "The Painting Company *had no idea* that the four applicants . . . were affiliated with the union." (Emphasis in the original; I note that "the union," in the context of the letter, refers to the Painters Union generally.)[18]

Arguably, I should hold TPC to this statement. (As I noted at the hearing, it is appropriate to presume that an account of facts by a party's counsel accurately states what the party told counsel.) I shall not do so, however, because the record makes it altogether clear that the statement is wrong. (Among other things, everyone agrees that by about mid-December the four employees had specifically informed TPC of their union membership.)

Considering the testimony of the various witnesses in this proceeding, I find that, at the time TPC hired Crisp, Hull, Meade, and Pratt, both Courts and Jeff Asman did know that each of the four was a union member. Courts knew that because at least one of the four employees told Courts of the employees' union membership in the course of the application process. In addition, Courts knew that the employees had been working for BCI at the lock and dam project and that BCI's work force was unionized. Jeff Asman knew because Courts told him.

Another issue, remarkably, is what Courts and Jeff Asman assumed, at the time TPC hired Crisp, Hull, Meade, and Pratt, about which local of the Painters Union the four were members of when Courts offered them jobs.

The issue arises this way. Franklin Furnace is within the jurisdiction of Painters Local 555. Bud Hayslip is the business representative of Local 555. In the summer of 1995 Hayslip heard that TPC was going to be the painting contractor for the Youth Detention Center project. That led Hayslip to meet with Jeff Asman several times to discuss TPC employing members of Local 555 at the Franklin Furnace site. Hayslip made it clear that he was not insisting that TPC sign a collective-bargaining agreement. Asman indicated that he would be amenable to hiring some members of Local 555.

In September 1995, Hayslip spoke to Courts about hiring members of Local 555. Courts spoke to Asman. Asman said he had no objection to Courts hiring union painters. Hayslip again spoke to Courts in November about TPC hiring some Local 555 members at the Franklin Funace site. As it happens, that was just before Crisp, Hull, Meade, and Pratt applied to Courts for work.

Painters' union rules require of members of the Union that, before they accept employment in an area outside the jurisdiction of their home local, they check in with the local union having jurisdiction over the area. Asman and Courts knew that and accordingly assumed that Crisp, Hull, Meade, and Pratt had first gained Hayslip's assent before seeking jobs at TPC. Thus, both Asman and Courts believed that they were honoring Hayslip's request when TPC hired the four employees.

As it happens, that was incorrect. None of the four employees were members of Local 555 and none had contacted Hayslip about working for TPC. Hayslip, indeed, had never been in touch with either Crisp, Hull, Meade, or Pratt, and he did not know of their application for employment with TPC. Rather, the four employees had discussed applying for employment with TPC with the business manager of a neighboring Painters local, Local 1072. That official, Michael Pennington, had urged them on, conditioned, however, on their engaging in organizing efforts among TPC's employees. Pennington said nothing to Hayslip about this state of affairs.[19]

As touched on earlier, Crisp, Hull, Meade, and Pratt began work at TPC's Franklin Furnace site on December 4, 1995. Almost at once they began, during breaks, to discuss the benefits of unionization among themselves and with other TPC employees. Courts was present when the employees engaged in these discussions.

Courts had previously been a longtime member of the Painters' Union, but he ended his membership in 1985. As of the period here at issue, he was profoundly embittered toward the Painters Union because the Union was refusing to pay him the pension that he believed he was due. Courts accordingly from time to time would respond to what he heard Crisp, Hull, Meade, and Pratt voice about the benefits of unions by saying things on the order of, "all unions ever do is screw you" and that anyone who was a member of the Painters Union "was pretty stupid." But Courts made no effort to silence the employees' prounion discussions.

As for Courts' supervision of the work of Crisp, Hull, Meade, and Pratt, any evaluation has to start with consideration of Courts' management style. Courts has decades of experience as a commercial painter and many years of experience as a

[17] One of the witnesses whom the General Counsel called in connection with Franklin Furnace issues is an erstwhile employee of TPC, Thomas Lloyd. As the discussion in the pages ahead indicates, I do not credit any of Lloyd's testimony on controverted issues.

[18] The letter is in the record as G.C. Exh. 45. The attorney who was lead counsel for TPC in this proceeding is not the attorney who wrote this letter.

[19] Crisp, Hull, Pratt, and Meade were members of Local 1072. Pratt was a member of yet another Painters Union Local.

foreman. He imposes high standards on himself and on those he supervises. Whenever Courts concluded that an employee he was supervising was failing to meet these high standards, Courts became insulting and abusive. And that is precisely the way he sometimes communicated with Crisp, Hull, Meade, and Pratt. Crisp, Hull, and Pratt caught the brunt of Courts' criticism because Courts quickly decided that the painting skills of these three employees were subpar. (That was not a complete surprise to Courts. He knew that their immediately previous work had been painting the dam and locks at the BCI worksite, a very different kind of work from painting the interior of rooms.) On the other hand, Courts considered Meade to be an outstanding employee—"a one hundred percent" painter.

Courts, however, did not discriminate against Crisp, Hull, Meade, or Pratt either in what he said or how he said it or in the assignments he handed out. (There was some testimony about Courts refusing to provide the four with safety gear. I do not credit that testimony.)

As the workday came to a close on Friday, December 15, Crisp, Hull, Meade, and Pratt each handed Courts a letter addressed to Courts from Thomas Williams, a business agent of the Tri-State Building & Construction Trades Council. Each of the letters stated, among other things, that:

> I am a representative of . . . a Labor Organization that is assisting a group of your employees who wish to organize their worksite at the Juvenile Detention Center. . . . The purpose of this letter is to make you aware that such an effort is going on and to provide you with the name of an employee who is part of this organizing effort. . . . [Each of the four letters then gave the name of Crisp, Hull, Meade or Pratt.]

Courts, in the gracious way in which he typically spoke to employees, told Meade that he would deliver the four letters to Jeff Asman so that Asman could "wipe his ass on them." Courts did deliver the letters to Jeff Asman.[20] Asman surely was not pleased about the letters. Further, upon receipt of the letters Asman realized for the first time that the four employees had not come to TPC via Hayslip's Local 555. Asman also realized that TPC's having employed four painters who were members of other local unions rather than Local 555 might seem to Hayslip as though Asman had reneged on his agreement with Hayslip. (That is precisely how Hayslip did view the matter when he came to learn of TPC's employment of Crisp, Hull, Meade, and Pratt.)

Earlier that week, Crisp, Hull, Meade, and Pratt had learned that TPC wanted them, along with many other of its employees, to work that weekend (December 16 and 17) painting the interior of a bottling plant in the Columbus area. When Meade asked Courts what would happen if he refused to accept an assignment like that, Courts said something on the order of:

> It would be a damn good possibility you won't have this job if you don't show up there, over the weekend, you will possibly not be able to work up here next week . . . if you don't show up, you're taking the consequences in your own hands.[21]

Neither Crisp, Hull, Meade, nor Pratt did show up for the weekend work at the bottling plant. Courts did complain to Meade about that, and perhaps also to Crisp, Hull, and Pratt. But none of the four was disciplined in any way.

Starting the following Monday (December 18), Crisp, Hull, Meade, and Pratt began handing out union authorization cards and leaflets to the other six or seven TPC employees then working at the Franklin Furnace site. (According to Meade, the four employees were not particularly successful in their organizing efforts. Meade testified that "there was a couple of them [the other TPC employees] that signed.")

On Tuesday, December 26—about 3 weeks after Crisp, Hull, Meade, and Pratt began working for TPC and less than a week before TPC terminated the employment of the four employees—Mike Pennington (the business manager of Painters Local 1072) visited the Franklin Furnace site while the employees were on a break. TPC had about 11 employees on the site (including Crisp, Hull, Meade, and Pratt). Pennington asked Courts if he could speak to the employees. Courts said yes. Pennington, with Courts present, handed out brochures and asked the employees about their job conditions and whether they faced any safety or pay problems. The employees just listened. Pennington concluded by telling the employees to call him if they had any problems. In the midst of Pennington's talk Courts voiced his opinion that "the union screwed me at the last 2 years I was in it . . . they blackballed me." But Pennington did not consider that Courts had been hostile to him. Three days later (December 29), Pennington again visited the Franklin Furnace site, this time with Hayslip, and again spoke to TPC's employees about the benefits of union membership.

In the meantime Courts came down with walking pneumonia and was out sick that Wednesday, Thursday, and Friday (December 27 through 29). As Courts' replacement, TPC sent an employee and sometime supervisor, Randy Howell, to the Franklin Furnace site.[22]

Courts returned to Franklin Furnace on Tuesday, January 2, 1996 (the first workday after Friday, December 29). When Crisp, Hull, Meade, and Pratt arrived at the jobsite that morning, Courts told each of them something along the lines of:

> I'm going to have to let you go . . . there's work shutting down elsewhere and we're going to move employees that's been with the Company [longer] than you all down here.

After laying off the four employees, Courts called TPC's office to suggest that the Company try to find work for them elsewhere. But TPC never again employed any of the four. December 29, 1995, was their last day of employment with TPC.

B. TPC's Staffing of the Franklin Furnace Site, January 2, 1996, and Thereafter

Courts' testimony about the layoff tracked the explanation he gave to Crisp, Hull, Meade, and Pratt. The only reason he laid them off was "because we were closing up other jobs and we had the manpower to man" Franklin Furnace with employees who had been with TPC "10, 11 years—five, six [years] and we

[20] A few days later, Williams mailed copies of the four letters to Jeff Asman.

[21] Crisp, Hull, and Pratt testified that while Meade was assigned to the weekend bottling plant work, they were not. And R. Exh. 20, while hard to read, also suggests that they were not. But I credit the testimony of Courts and Jeff Asman, both of whom testified that the four employees were assigned to that weekend work, and of Meade, whose testimony suggests the same thing.

[22] Thus Courts was not at the site when Pennington visited it for a second time (on December 29). Howell testified credibly that, as temporary supervisor, he became dissatisfied with the skills of Hull and Pratt. Additionally, Howell came to suspect that Hull and/or Pratt deliberately dripped paint for hundreds of feet on a sidewalk on the site. Howell spoke to Courts about both of these matters.

could use them and that's the reason." The skills of the four employees, or lack thereof, said Courts, were beside the point. Even had each the four been an excellent painter, Courts would nonetheless have laid off all four of them "because we had other people coming down that had been employed with the Company longer."

I do not credit that testimony, for two reasons.

One is that it is not TPC's practice to lay off employees because more senior employees, who had been working at another site, had become available. Of course an employer is entitled to change its staffing policies. But there is no evidence that on or before December 29 TPC had decided to switch to a seniority system.

More importantly, too many facts are contrary to Court's testimony. In this connection, let us consider the contentions, explicit and otherwise, in Court's testimony on this point. Namely:

1. On or soon after January 2, the number of employees whom TPC needed at other worksites diminished substantially.
2. As of December 29, TPC employed 10 employees at the Franklin Furnace site, plus Courts. Six of these ten continued to work at the site (Crisp, Hull, Meade, and Pratt, of course, being the four who did not). Implicit in Court's testimony is that all six of these remaining employees had been with TPC substantially longer than had Crisp, Hull, Meade, and Pratt.
3. According to Courts, of the employees whom TPC shifted to Franklin Furnace on or soon after January 2, all but two specified exceptions had years of experience with TPC and, in the period prior to January 1996, had been working for TPC at sites other than Franklin Furnace.[23] As for Courts' contention that as of about January 2 there was a decrease in employees working at other TPC jobsites, that, generally speaking, was the case:

Date	Total Employees	Date	Total Employees	Date	Total Employees
12/1	40	12/15	42	1/2	35
12/4	44[24]	12/18	41	1/3	41
12/5	52	12/19	40	1/4	37
12/6	51	12/20	39	1/5	34
12/7	51	12/21	40	1/8	—
12/8	47	12/22	38	1/9	35
12/11	39	12/26	33	1/10	35
12/12	41	12/27	37	1/11	35
12/13	41	12/28	40	1/12	34
12/14	40	12/29	44[25]	1/15	35[26]

As for the seniority of the coworkers of Crisp, Hull, Meade, and Pratt at Franklin Furnace as of December 29, five of the six had been with TPC for at least a year.[27] But one, Estelle Mayfield, had been with TPC only since October 18, 1995; that is, only about 1-1/2 months longer than Crisp, Hull, Meade, and Pratt. If TPC had been so interested in opening slots at Franklin Furnace for its oldtimers who had been working at now-completed sites, one would expect TPC to have lumped Mayfield together with Crisp, Hull, Meade, and Pratt. That, however, was not the case. Mayfield (along with the five others) continued to work at the Franklin Furnace site on January 2 and thereafter.[28]

Now let us turn to the employees whom TPC assigned to work at Franklin Furnace on or soon after January 2 (1996). Putting aside the new supervisor and the laborer to whom Courts referred, TPC added 11 employees to the Franklin Furnace site between January 2 and 15. Of the 11, 3 were genuine oldtimers.[29] A fourth employee had been with TPC for about 10 months;[30] for argument's sake, let's call him an oldtimer too.[31]

Of the remaining seven:

1. One, Harrison Stone, had been with TPC only since October 13, 1995—hardly the many years to which Courts referred.[32]
2. One, Barnie Traylor, had been hired by TPC on March 7, 1995. He then left TPC 17 days later. TPC rehired him on November 28.[33] (For argument's sake I will deem Traylor's employment at Franklin Furnace as fitting Courts' explanation about moving oldtimers to the Franklin Furnace site, notwithstanding this hiatus and notwithstanding the brief period that Traylor was with TPC prior to November 1995, on the grounds that TPC rehired Traylor before Crisp, Hull, Meade, and Pratt came aboard and that Traylor was working at other TPC sites from November 28 through early January.)
3. Lloyd Wolfe was first hired by TPC on November 28 (1995), just 4 days before TPC hired Crisp, Hull, Meade, and Pratt.[34]
4. TPC rehired Steve Horn on December 28, Horn having worked for TPC for 1 day in March 1995.[35] Given that Horn was not employed by TPC when TPC hired Crisp, Hull, Meade, and Pratt, and given Horn's prior 1-day career with TPC, to say the least it is hard to square Horn's presence at Franklin Furnace with Courts' claim about why it was that TPC laid off the four employees.

[23] The two exceptions noted by Courts: one employee (Mel Wood) hired to be a supervisor or lead employee at the Franklin Furnace site and an unskilled employee (John Branscomb) hired as a laborer.

[24] The first day that TPC employed Crisp, Hull, Meade, and Pratt.

[25] The last day that TPC employed Crisp, Hull, Meade, or Pratt

[26] I had no particular reason to begin the listing precisely on December 1 or to end it on January 15. But I have checked additional data; they are not inconsistent with those shown above.

[27] The five: Clark, Henry, Howell, Lloyd, and Myers

[28] Mayfield's employment with TPC ended on January 29. The record does not tell us why.

[29] O'Reilly, Moore, and Six.

[30] Jerry Taylor (an apprentice).

[31] For information about the TPC employees who continued to work at Franklin Furnace after December 29, 1995, or who were switched to Franklin Furnace, I relied largely on G.C. Exhs. 46, 47, and 51 and, to a much lesser extent, R. Exh. 29. I found R. Exh. 21, while purportedly on point, to be incomplete and misleading.

[32] TPC switched Stone to the Franklin Furnace site on January 9.

[33] Traylor was assigned to work at Franklin Furnace starting on January 10, but never showed up at the site. Traylor had once been a union member. But as of the time TPC assigned him to Franklin Furnace, Traylor had not been a union member for 8 years.

[34] TPC switched Wolfe to Franklin Furnace on January 15.

[35] Horn was employed as an apprentice. David Asman testified that TPC did not re-hire Horn until January 2. But G.C. Exh. 51 and R. Exh. 29 show that Horn was working for TPC on December 28 (1995), and thereafter (until January 29, 1996).

5. Robert Walker was first hired by TPC on December 28, 1995 (24 days *after* TPC hired Crisp, Hull, Meade, and Pratt).[36]
6. Dennis Lawson was hired on January 9, 1996. Lawson worked 1 day at another site before being ordered to Franklin Furnace on January 10. (Lawson had first been hired by TPC on June 21, 1995, but left TPC 2 days later.)
7. David Metz was first hired by TPC on January 15, 1996, more than 2 weeks after TPC terminated the employment of Crisp, Hull, Meade, and Pratt.[37] (David Asman testified that Metz had previously worked for TPC, from sometime in 1994 into early 1995. But no documentary evidence supports that claim. In any event, as with Lawson, that earlier employment by TPC—if there was any—is beside the point.)

C. Crisp, Hull, Meade, and Pratt—Conclusion

TPC hired Crisp, Hull, Meade, and Pratt knowing that they were union members. And notwithstanding Jeff Asman's response to the COMET T-shirts at the State House, the record fails to show that TPC tends to fire employees who engage in organizing efforts. Consider, in this connection, that a few days after Crisp, Hull, Meade, and Pratt tendered their organizing letters to Courts, they gave Courts a ready-made excuse to fire them by failing (without notice) to show up at their weekend assignment

But let us return to Courts' testimony that the only reason he laid off Crisp, Hull, Meade, and Pratt was "because we were closing up other jobs and we had the manpower to man" Franklin Furnace with employees who had been with TPC "ten, eleven years—five, six [years] and we could use them and that's the reason." Even granting Courts the right to some hyperbole, his testimony simply does not square with reality—not even closely. That is blatantly so, of course, in respect to employees Walker, Lawson, and Metz.

What we have, then, is a demonstrably false explanation for the termination of the employment of four employees who actively supported the Union. This, in turn, has to be considered in light of: (1) the Asmans' intention to keep TPC nonunion, even to the extent of threatening to close the Company's doors if its employees sought union representation; (2) Jeff Asman's concern that TPC's employment of Crisp, Hull, Meade, and Pratt had led to ill feelings toward TPC by Bud Hayslip, the business agent of the Local Union with jurisdiction over the Franklin Furnace site; and (3) the fact that various other TPC jobsites were closing down, resulting in a surplus of TPC employees, provided a convenient excuse for laying off Crisp, Hull, Meade, and Pratt.

These circumstances, it seems to me, point toward the likelihood that TPC terminated the employment of Crisp, Hull, Meade, and Pratt because of their union membership and activities. See *Shattuck Denn Mining Corp. v. NLRB,* 362 F.2d 466 (9th Cir. 1966); accord: e.g., *Letter Carriers (Postal Service)*, 315 NLRB 1176, 1178 at fn. 12 (1994), enf. mem. 100 F.3d 942 (2d Cir. 1996); *General Electric Corp.*, 256 NLRB 753, 755 (1981) (membership in a particular union is not a lawful employment criterion).

Three other considerations warrant discussion.

One has to do with the fact that it was Courts, not the Asmans, who told Crisp, Hull, Meade, and Pratt that they were "laid off." But as I considered the evidence, I came to the conclusion that, more likely than not, it was the Asmans who developed the story about laying off the four employees because, supposedly, longtime TPC employees were ending their work at other sites. Courts merely followed instructions. Further, it is clear that Courts, like the Asmans, wanted TPC to remain nonunion.

Second, David Asman testified that the reason that TPC laid off Crisp, Hull, Meade, and Pratt was that they were "substandard" workers, "not well suited" for the Franklin Furnace job. There are, however, two difficulties with Asman's testimony. The first is that Courts testified that the four employees' skill levels had nothing to do with their layoff. The second is that Courts testified that one of the four, Meade, is an exceptionally skilled painter.

Third, if the record showed that TPC would have laid off Crisp, Hull, Meade, and Pratt on December 29 even absent the employees' union membership and other protected activity, there would be no violation of the Act. *Wright Line,* supra at fn. 9. But the record shows the reverse in the case of Meade (as just noted). As for Crisp, Hull, and Pratt, it was TPC's burden to show that it would have terminated their employment even absent any protected activity. I find that TPC failed to meet that burden.

In sum, I conclude that TPC violated Section 8(a)(3) and (1) of the Act by terminating its employment of Crisp, Hull, Meade, and Pratt.

V. CARL FRAZER

Carl Frazer is a member of Painters Union Local 999. In December 1995, Frazer lived in Waterloo, Ohio, which is an easy drive from Franklin Furnace.

Early in December Frazer heard that painting work might be available at the Youth Detention Center project in Franklin Furnace. He spoke directly to Courts about that, saying that he was working for a contractor called Loft Painting, that Loft was insisting that he travel, and that he did not want to leave the area because his wife was pregnant and her expected delivery date was in the near future. Courts knew that Loft was a unionized company and advised Frazer that TPC's employees were not represented by a union. Frazer said that he nonetheless wanted to work for TPC at the Franklin Furnace site. Courts said he might need additional employees later. Frazer followed up his conversation with Courts with telephone calls to David Asman.

On December 26 Frazer again spoke to Courts, and Courts responded by telling Frazer to show up for work the next day, Wednesday, December 27. Frazer did as he was told and worked as a TPC employee for 8 hours on December 27.[38]

Frazer's wife became ill during that evening and remained ill throughout December 28. Frazer stayed with his wife that day, did not report for work, and did not notify anyone at TPC that he would not be coming in to work. Early in the morning of December 29 Frazer's wife gave birth. Frazer did not report for work that morning either and, as before, did not notify anyone at TPC about that.

[36] TPC switched Walker to Franklin Furnace on January 4.

[37] Franklin Furnace was Metz' first worksite for TPC.

[38] Frazer, like Crisp, Hull, Meade, and Pratt, did not check with the local union with jurisdiction over Franklin Furnace (Local 555) before accepting employment with TPC at the Franklin Furnace site.

About lunchtime Frazer did visit the Franklin Furnace site to say why he had not come in for work and, in addition, to advise that he would be unable to work the remainder of the day. He gave this information to Randy Howell who, it may be recalled, replaced Courts for the period December 27, 28, and 29 while Courts was out sick. Howell, who did not know the circumstances under which Courts had hired Frazer and who had no authority to hire or fire, decided to leave matters concerning Frazer's employment to Courts. Howell accordingly told Frazer to report to Courts at the start of the next workday, January 2.

Frazer did report for work on January 2. But Courts, who knew that Frazer had worked only 1 day and had then failed to show up on the 2 succeeding days, told Frazer that he was no longer employed by TPC. Frazer testified that Courts, in the course of telling Frazer that, said that he might later be able to offer Frazer work "when we get these Union problems cleared up." I find it unlikely that Courts said any such thing. Rather, I find that Courts was the kind of supervisor who under no circumstances would tolerate any new employee working just 1 day, then failing to show up for the next 2 without giving any notice, whatever the reason for it. I find, that is to say, that TPC terminated Frazer's employment because Frazer failed to show up for work on 2 successive days without providing timely notice to the Company.

I thus conclude that TPC's treatment of Frazer did not violate the Act.

There is one last matter to consider in connection with TPC's termination of Frazer's employment. Frazer filed a claim with the Ohio Bureau of Employment Services for unemployment benefits. TPC opposed Frazer's claim on the ground that Frazer "worked one day then did not report for work for several days without notifying us."[39] The General Counsel moved to introduce into evidence a document that purportedly is a decision of the State of Ohio Unemployment Compensation Board of Review. It states that Frazer "was separated from employment when [TPC] chose to replace local employees with out-of-town employees as part of an effort to combat a union organizing campaign."[40] I sustained the Respondent's objection to the General Counsel's motion.

As the General Counsel points out, however, it is the Board's policy to take into account what state agencies have to say about why an employer terminated an employee's employment. As stated in *Crispus Attucks Children's Center*, 299 NLRB 815, 836 (1990):

> both the Board and the courts have concluded that the findings of State Unemployment Compensation Boards as to the reasons employees were discharged have probative value.[41]

Because I did not admit the Board of Review's decision into evidence, the Respondent has had no opportunity to respond to it. Treating that state agency's decision, nonetheless, as though it had been received into evidence, I remain of the view that TPC terminated Frazer's employment solely because of his absences from work without notice.[42]

[39] GC Exh. 34.

[40] GC Exh. 56 (in the rejected exhibits file).

[41] Accord: e.g., *Whitesville Mill Service Co.*, 307 NLRB 937, 945 fn. 6 (1992); *Trayco of S.C.*, 297 NLRB 630, 636 (1990).

[42] It appears that under certain circumstances the Board may give collateral estoppel effect to the decision of another forum. See *Tri-County Roofing*, 311 NLRB 1368, 1378 (1993), enfd. mem. 148 LRRM 2640 (3d Cir. 1995), cert. denied sub nom. *United Slate, Tile & Composition Roofers Local 30 v. NLRB*, 516 U.S. 818 (1995); but see *Phoenix Newspapers,* 294 NLRB 47 fn. 5 (1989) ("We find it unnecessary to pass on the judge's alternative rationale that under Section 10(a) of the Act the doctrine of collateral estoppel is inapplicable to Board proceedings as a matter of law"). On the other hand, it is clear that "the findings of State Unemployment Compensation Boards as to the reasons employees were discharged" are not entitled to collateral estoppel effect and, accordingly, "are not conclusive." *Crispus Attucks,* supra.

VI. TPC'S FAILURE TO HIRE DEBRA PENNINGTON

The General Counsel alleges that TPC refused to hire job applicant Debra Pennington because of her membership in the Painters Union, thereby violating Section 8(a)(3) and (1) of the Act.

A. Debra Pennington's Written Job Applications

Debra Pennington is married to Mike Pennington. It may be recalled that Mike Pennington is the union official who encouraged Crisp, Hull, Meade, and Pratt to apply for work at TPC's Franklin Furnace jobsite in order to assist in a union organizing effort there. On December 5, 1995, either Debra or Mike called TPC's office and asked a clerical employee to fax a job application form to the union hall. In response TPC faxed a four-page job application form and a two-page "pre-employment exam" to the hall. Mike made a number of copies. He gave one set to Debra.

Debra filled out the application, answered the exam questions and, on December 7, faxed the now-completed form back to TPC. The fax cover sheet specified that the fax had been sent from Local 1072's hall, each page of the fax showed an abbreviated reference to Local 1072,[43] and each one of the employers that Debra listed in the employment history part of the application form was unionized. The application also indicated that Debra lived in Ashland, Kentucky, which is very close to Franklin Furnace but well over a 100 miles from Columbus, where TPC does most of its business.

Jeff Asman read Debra's application. But TPC did not communicate with Debra about it. Jeff Asman testified that he did not notice that Pennington's application was faxed from Local 1072's hall or that her prior jobs were with unionized employers. But I find it more likely than not that, upon reading Pennington's application, Asman realized that she almost surely was a member of the Painters Union.

On about December 16, Mike mailed another copy of Debra's application to TPC. Again, TPC did not respond to it.

Finally, on December 27, Debra called TPC and spoke to David Asman. When Debra spoke particularly of the Franklin Furnace site, Asman said that TPC already had assigned 14 or 16 employees to work there.[44] David said that he knew nothing of her job applications. Debra said that she'd send TPC another. She did, mailing a letter to TPC's "Equal Employment Officer" that enclosed yet another copy of her job application.[45] Debra's

[43] At the top of the page was the legend: IBPAT LU 1072.

[44] On December 27, 11 TPC employees were working at the Franklin Furnace site (in addition to Courts). On January 2, the first workday after Crisp, Hull, Meade, and Pratt after December 29, TPC had only six employees working at the Franklin Furnace site. But 2 days later the Franklin Furnace crew was up to 11 employees, and on January 11, TPC had 14 employees at the site. (The numbers are from G.C. Exh. 51.) On December 27, David Asman surely knew that TPC had ordered some of its employees who had been working at other sites to switch to Franklin Furnace.

[45] G.C. Exh. 9. The General Counsel seems to be arguing that TPC should ordinarily been expected to be eager to hire a woman in order to

letter indicates that her employment interest was in TPC's Franklin Furnace jobsite. Jeff Asman did read the letter. But TPC did not respond to this communication either.

The question is whether there is anything suspicious about TPC's lack of responses to Debra's employment applications.

TPC did hire some painters during December 1995—roughly the period in which Debra sent her applications to TPC. Indeed, Courts, on TPC's behalf, hired Crisp, Hull, Meade, and Pratt to start work at Franklin Furnace on December 4. And Courts hired Frazer to start work on December 27. But even apart from the fact that, as Courts knew, Crisp, Hull, Meade, Pratt, and Frazer were all union members, that hardly suggests that TPC behaved nefariously in respect to Debra Pennington. Specifically, the record fails to show that TPC would have behaved differently toward Pennington's application had she not been associated with the Union. Rather, the evidence points the other way. TPC routinely chooses to reject written job applications for employment, particularly applications from those who do not visit TPC's office.

B. Debra Pennington's Visit to the Franklin Furnace Jobsite

Debra visited TPC's Franklin Furnace site on December 15 and spoke to Courts about employment there, mentioning the written application she had sent to TPC's office.[46] But TPC, having put on Crisp, Hull, Meade, and Pratt at the Franklin Furnace site about 10 days earlier, did not then need any additional employees there. Additionally, Courts knew that work at some other sites was winding down and that TPC accordingly would be moving employees from one or more of those sites to Franklin Furnace. Courts mentioned that to Debra. (Courts did not know that Debra was a union member. In any event, it is most unlikely that the conversation would have been any different even had Courts thought that she was.)

On or shortly before December 26, Courts decided that he did need another employee at the Franklin Furnace site. As luck would have it, Frazer happened to speak to Courts on December 26, and Debra did not. Courts (despite knowing that Frazer was a union member) told Frazer to begin his work for TPC the next day, December 27.

C. Debra Pennington—Conclusion

The record fails to show that TPC discriminated against Pennington because of her union membership, whether by the Asmans in connection with her written job applications or by Courts in connection with her visits to the Franklin Furnace site. I accordingly will recommend that the Board dismiss the General Counsel's allegations against TPC regarding the Company's treatment of Debra Pennington.[47]

In the event that the Board disagrees with me about that, there is one more matter to deal with. That is, the question of whether Pennington was a bona fide applicant for employment.

The first that TPC heard about Debra Pennington was on December 7. But on December 6 Pennington accepted a job offer from another contractor, R.A.K. Corrosion Control, and she began work for that company on December 7. She was still working for R.A.K. when, on December 16, her husband put another copy of her application to TPC in the mail. R.A.K. then briefly laid off Pennington toward the end of December, so that she was not working on December 27, when she spoke to David Asman. But Pennington's work for R.A.K. resumed for a few more weeks in early January.

Pennington testified that, notwithstanding the R.A.K. job, she would at all times have accepted an offer from TPC. On the other hand, when Pennington was asked, "[S]o, was it your plan . . . to quit that job if any other opportunities came up," she responded: "No. I don't make it a habit to quit on anybody until the job is completed and I'm laid off." And when Pennington was asked, "[W]hat if The Painting Company would have called you back on the 27th [of December] and said we want you to start tomorrow," she replied: "I would have had to address that situation when it came up."

As I understand the Board's position on the matter, it was the General Counsel's burden to show that Pennington was a bona fide applicant for employment with TPC.[48] My conclusion is that the General Counsel did not carry that burden and therefore, for this reason too, the Board should dismiss the allegation that TPC violated Section 8(a)(3) by failing to hire Pennington.

VII. THE JOB APPLICATIONS OF GRIM, CALDWELL, AND WALLER

Linda Caldwell filled out a TPC employment application at the same time that Debra Pennington did. Mike Pennington faxed Caldwell's application to TPC when he faxed Debra's (on December 7).

A week later Mike Pennington faxed the job applications of Billy Ray Waller and Carl Grim to TPC. As with Debra Pennington's and Caldwell's, the faxes were sent from the Local 1072 hall and thus showed at the top of each page the legend IBPAT LU 1072.

As with Debra Pennington, TPC never responded to these job applications. And as with Debra Pennington, the General Counsel alleges that TPC failed to make job offers to Caldwell, Grim, and Waller because management knew that these applicants were union members.

It is likely that TPC's management did believe that Caldwell, Grim, and Waller were union members. But as with Debra Pennington, the record does not show that TPC discriminated in any way by failing to respond to the written applications of these three.[49]

Grim credibly testified that he telephoned TPC's office on three occasions, saying that he was interested in working at TPC's Franklin Furnace site. TPC did not respond to those telephone calls. But again, even assuming that TPC connected those calls with Grim's written application (which showed that he was a union member), nothing in the record suggests that he would have been treated differently had management believed that he was not connected with any union.

VIII. DUNN'S AND COWGILL'S VISIT TO TPC

David Dunn, it may be recalled, became the subject of Jeff Asman's attention when he worked at TPC's State House site on January 18 and 19, 1996, and, with Lawson, wore a COMET

meet its equal employment obligations. But as I listened to the testimony, I concluded that the Asmans were unconcerned about the male/female ratio of TPC's work force.

[46] Debra had visited the Franklin Furnace site on December 5 but did not then have the opportunity to speak to anyone from TPC.

[47] See generally *Shell Electric*, 325 NLRB 839 (1998).

[48] See *3E Co.*, 322 NLRB 1058, 1061–1062 (1997), enfd. mem. 132 F.3d 1482 (D.C. Cir. 1997), quoting *NLRB v. Ultrasystems Western Constructors*, 18 F.3d 251, 256 (4th Cir. 1994); *V.R.D. Decorating,* 322 NLRB 546, 552 (1996).

[49] I note that there is no evidence that either Caldwell or Waller was a bona fide applicant.

T-shirt at the site. That, in turn, resulted in TPC ending its relationship with Quality Painting Services.

On February 19, 1996, Dunn and fellow union member John Cowgill visited TPC's office, filled out job applications, and were interviewed by David Asman. Through it all, Cowgill wore a cap with a union logo.

According to the General Counsel, TPC rejected Dunn's and Cowgill's job applications because the two employees "formed, joined, or assisted a labor organization and engaged in union or concerted activities, and to discourage employees from engaging in these activities" (to quote from the complaint).

Dunn and Cowgill testified that Jeff as well as David Asman was in the office and that they (Dunn and Cowgill) could tell, from the hand movements, facial expressions, eye movements, and other conduct of Jeff and David, that the two Asmans viewed them with hostility, and, moreover, that this hostility stemmed from: (1) Cowgill's wearing of a union hat and his indication that he had worked for unionized contractors; and (2) Jeff Asmans' recollection that Dunn had worn a COMET T-shirt at the State House project.

David Asman testified that he interviewed Dunn and Cowgill, that he found both Dunn and Cowgill to be unprepossessing applicants, and that he was unaware that Dunn had worked at the Statehouse. According to Asman, Dunn's conduct and appearance were utterly inappropriate and his written application was unsatisfactory both in appearance and content. Cowgill's job application efforts were somewhat less awful. But his written application also had virtually nothing to commend it. As for Jeff Asman's knowledge that Dunn had worked at the State House, both Jeff and David Asman testified that Jeff was not in the building during the time that Dunn and Cowgill were there.

The testimony of both Dunn and Cowgill was confused, patently in error in several respects, and otherwise not credible. I wholly credit David and Jeff Asman concerning TPC's response to Dunn's and Cowgill's job applications.

I accordingly conclude that TPC's failure to favorably consider the job applications of Dunn and Cowgill in no way violated the Act.

REMEDY

A. The Painting Company

TPC ended its relationship with Quality Painting Services because of the union activities of David Dunn and Rena Lawson. Since TPC was a joint employer of Dunn and Lawson, TPC must make Dunn and Lawson whole for any loss of earnings and other benefits they would have earned had TPC not prematurely discontinued Quality's subcontract, less net interim earnings, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I leave for the compliance stage the determination of: the precise duration of the subcontract but for TPC's unlawful acts;[50] the hours per day that Dunn and Lawson would have worked at the State House; whether backpay should be based on their actual, albeit apparently unlawful, rates of pay or on the rates of pay that Ohio law required; and other like matters.[51]

As for employees Crisp, Hull, Meade, and Pratt, TPC must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement.[52] Backpay shall be less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, supra.

TPC shall be required to cease its unlawful actions and to post the usual form of notice. In view of the nature of TPC's business, TPC shall post the notices not only at its office in Plain City, Ohio, but, additionally, at all sites at which its employees are currently working.

B. Quality Painting Services

The evidence shows that Michael Grondon was aware of the reason for the Asmans' unhappiness with Dunn and Lawson and that Grondon by no means "took all measures within [his] power to resist the unlawful action." *Capitol EMI Music*, 311 NLRB 997, 1000 (1993). But since the General Counsel specifically declined to seek any remedy from Quality, I shall order none.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, The Painting Company, Plain City, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that the Respondent's existence will be ended if the employees choose to be represented by a union.

(b) Discriminatorily ordering employees to cease displaying union symbols.

(c) Terminating the employment of employees because of their union membership or activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make David Dunn, Rena Lawson, Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt whole for any loss of earnings and other benefits suffered as a result of the discrimination

[50] Included in that calculation will be the question of when the Asmans would have learned about Quality's failure to carry workers compensation insurance.

[51] Ordering reinstatement would not be appropriate since it is clear that TPC never planned to utilize Quality's services for more than a few weeks. I have considered the fact that, at some point after TPC ceased dealing with Quality, TPC directly hired as apprentices two employees who had worked at the State House as employees of Quality: LeRoy Allen Hunt and Scott Allen Hunt. (One set of TPC records purports to show that TPC hired the two Allens on January 18, 1996; but that is incorrect.) However, the only connection between TPC's hiring the Hunts and the TPC/Quality relationship is that TPC supervisors became acquainted with the Hunts during that relationship. Note also that Dunn and Lawson consider themselves to be journeymen, not apprentices.

[52] The facts may show that it would be inappropriate to order TPC to reinstate these four employees. And that, in turn, would affect backpay amounts. (For instance, the record suggests that the four might have been reluctant to accept jobs at sites as far north as Columbus.) But these are matters for consideration in the compliance stage. *Dean General Contractors*, 285 NLRB 573 (1987); accord: *Laben Electric Co.*, 323 NLRB 428 (1997).

[53] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

against them in the manner set forth in the remedy section of the decision.

(b) Within 14 days from the date of this Order, offer Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its office in Plain City, Ohio, and at all sites at which any of its employees are employed on such date of posting, copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. The Respondent shall take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 29, 1995.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[54] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."